

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

RSA No.4744 of 2010 (O&M)

Date of decision : 27.09.2016

Malkiat Singh and another

...Appellants

Versus

Karnail Singh and others

(deceased through LRs)

..Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL.

Present: Mr. Vikas Bahl, Sr. Advocate with
Mr. Narender Vadehra, Advocate and
Ms. Balpreet Sidhu, Advocate for the appellants.

Mr. Arun Jain, Sr. Advocate with
Mr. Arnav Sood, Advocate for respondent No.1.

Mr. Arjun Kundra, Advocate for respondent No.3.

AMIT RAWAL, J. (Oral)

The appellants-defendants are aggrieved of the concurrent findings of fact, whereby suit seeking specific performance of the agreement to sell dated 09.04.1993 in respect of suit land measuring 78 kanals situated in Village Beer Sarkar, District Hoshiarpur, has been decreed and regarding 85 kanals 13 marlas owned by Charanjit Singh who is attorney holder of Arjun Singh, relief sought declined.

Mr. Vikas Bahl, learned Senior Counsel assisted by Mr.

Narender Vadehra, appearing on behalf of appellants-defendants submits that respondent-plaintiff propounded the aforementioned agreement to sell, whereby appellants-defendants had allegedly agreed to sell the aforementioned land for total sale consideration of ₹13,70,568.75/- against the receipt of earnest money of ₹10,000/-. The agreement to sell also envisage that on particular date i.e. before the target date which was 31.07.1993, on 19.04.1993, a sum of ₹1,90,000/-was to be paid but the same was extended to 05.05.1993 yet the respondent-plaintiff did not come forward, thus, there was breach, but despite that the plaintiff did not choose to file the suit for specific performance, instead filed the suit No.120 of 1993 for permanent injunction on 26.05.1993. The aforementioned suit was dismissed on 20.01.1994 vide Ex.P5. Though in written statement, the execution of the agreement to sell was specifically denied by averring that it was outcome of the forgery and fraud but the provision of law cannot be thrown to the winds as the suit was barred under the provision of Order 2 Rule 2 of CPC. Once there was already breach, the respondent-plaintiff should not have waited for the target date. After the dismissal of the injunction suit, suit seeking specific performance has been filed on 25.03.1994.

In support of the grounds of appeal, he has relied upon entire statement including cross-examination of PW1 and PW3 to contend that suit ex facie was barred under the provision of Order 2 Rule 2 of CPC. In support of contention, he relies upon following judgments:-

- i) *M/s Virgo Industries (Eng.) P. Ltd. Vs. M/s Venturetech Solutions P. Ltd., 2012(4) RCR (Civil) 372,*

ii) *Kamal Kishore Saboo Vs. Nawabzada Humayun Kamal Hasan Khan, 2001(3) RCR (Civil) 565,*

iii) *Rakesh Kumar Vs. Ajit Singh, 2001(3) RCR (Civil) 285.*

He further submits that agreement to sell was not concluded contract but it was an intention, whereas actual agreement to sell was to be entered on 05.05.1993 when the balance amount as agreed was to be paid, therefore, it was not concluded contract. In support of his contention, he relies upon judgment rendered by Hon'ble Supreme Court in *Ganesh Shet Vs. Dr. C.S.G.K. Setty, 1999 (1) RCR (Civil) 65*, and thus urges this Court for setting aside of the judgment and decree under challenge.

Per Contra, Mr. Arun Jain, learned Senior Counsel assisted by Mr. Arnav Sood, learned counsel appearing on behalf of respondent(s) submits that agreement to sell if read in toto was in respect of two pieces of land measuring 78 kanals owned by the appellant-Malkiat Singh and 85 kanals 13 marlas owned by Charanjit Singh who is attorney holder of Arjun Singh. Agreement to sell envisage that ₹1,90,000/- was to be paid on behalf of Charanjit Singh to be received by Arjun Singh. In fact earnest money of ₹10,000/- was in respect of 78 Kanals of land. Much proportion is blown but from the contents of the agreement to sell, reveals that it was concluded contract in essence, plain and simple language of the agreement to sell leaves no manner of doubt that parties had set their hands together for selling of the land as it also contained the element of compensation. Even if the agreement to sell does not envisage relief of specific performance through the intervention of the Court yet the plaintiff is not precluded from seeking relief of specific performance. In support of contention, he has

relied upon ratio decidendi culled out by Hon'ble Supreme Court in *P.D'Souza Vs. Shondrilo Naidu, 2004 (6) SCC 649*.

As regards objection under Order 2 Rule 2 submits that until and unless pleadings of the previous suit are not placed on record, no objection qua applicability of res judicata can be taken. No attempt has been taken to place on record the copy of plaint and written statement and, therefore, ratio decidendi culled out in M/s Virgo Industries (Eng.) P. Ltd.'s case relied upon by Mr. Bahl, would not be applicable and urges this Court for affirming of the findings under challenge.

Before conclusion of the arguments, he has drawn attention of this Court to the findings arrived by the lower Appellate Court in paragraph No.10, wherein the Court had asked the question to the Vendor whether he recognized the signatures on the agreement to sell. Needless to say question was not put only once but at least 2 to 3 times and the answer was that he would not reply until and unless agreement to sell was read out to him. The lower Appellate Court has also taken into consideration the conduct, whereas on the contrary, agreement to sell has been proved through the testimony of attesting witnesses. Defendant has failed to dispel doubt of his signatures. Even the plea of obtaining the loan had been taken for the sake of it, as no documentary evidence, much less, corroborative evidence has been led to show that any amount was returned or not.

I have heard learned counsel for the parties and appraised the paper book and of the view that there is no force and merit in the submissions of Mr. Bahl, for, vis-a-vis objection under Order 2 Rule 2 of CPC as pleadings of the previous suit have not seen the light of the day in

the present suit, therefore, as per the ratio decidendi culled out in M/s Virgo's Industries (Supra), do not apply. In fact, the alleged breach according to Mr. Bahl, on 05.05.1993 is in respect of receipt of the amount of land belonging to the Charanjit Singh but the Courts below had declined to grant the discretionary relief as neither Charanjit nor his attorney is signatory to the agreement to sell.

As regards the plea of contract being not concluded, I am of the view that Court found that contract vis-a-vis the land of Malkiat Singh i.e. 78 kanals was concluded. The appellants-defendants have failed to lead any evidence to disprove the signatures on agreement to sell. On going through the contents of agreement to sell, it is clearly decipherable that the parties had entered into agreement to sell containing the element of compensation. *Dadarao Vs. Ramrao's case* came to be pondered by Hon'ble Supreme Court of India in *P.D'Souza Vs. Shondrilo Naidu, 2004 (6) SCC 649.*, wherein it has been held that even if in such situation owing to the breach, only liquidated damages are to be given, it does not preclude the plaintiff to seek relief of specific performance. The order dated 20.01.1994 Ex.P5 is not dismissal of the suit rather it says that suit was rendered infructuous as right had accrued in favour of plaintiff to seek specific performance. It is in this background of the matter, suit in March, 1994 was filed.

I am of the view that findings arrived at by both the Courts below are based on appreciation of oral and documentary evidence. Judgment relied upon by Mr. Bahl, regarding non-conclusion of the contract, for the foregoing reasons, do not apply to the facts and circumstances of the case. For adjudication of the lis, document has to be

examined.

I do not intend to differ with the findings rendered by Courts below, much less, no substantial question of law arises for determination.

Accordingly, appeal is dismissed.

27.09.2016

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**(AMIT RAWAL)
JUDGE**

Whether speaking/reasoned:-

Yes/No

Whether reportable:-

Yes/No